Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling that	)	WC Docket No. 02-361
AT&T's Phone-to-Phone IP	)	
Telephony Services Are Exempt	)	
From Access Charges	)	

Comments of Beacon Telecommunications Advisors, LLC

Beacon Telecommunications Advisors, LLC (Beacon) submits these comments in response to the Commission's Public Notice seeking comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony services are exempt from access charges.

Beacon is a regulatory, financial, and management consulting firm providing services to independent and tribal rural local exchange carriers (LECs) throughout the United States. Beacon's clients are directly impacted by decisions related to the issues presented in this petition.

Summary of Opinion

Beacon strongly opposes AT&T's attempt to avoid paying access charges by virtue of routing calls over the Internet via IP Telephony technology. Beacon consequently raises questions on several of AT&T's points and issues presented to the Commission in their petition, and accordingly will illustrate that AT&T is inaccurate and false in their notion that IP is equivalent to Internet. Lastly, Beacon emphasizes that in accordance with prior Commission orders on the concepts of "leaky PBX" and Regulatory Arbitrage, which we believe apply to this proceeding, AT&T's petition should be denied.

"IP Telephony" and "Internet" are two Separate Issues

AT&T repeatedly states in their petition that the IP Telephony services it offers "over the common Internet" should be exempt from access charges.[1] In their corroboration, however, AT&T is "mixing apples and oranges". AT&T is suggesting that because IP Telephony is the technology of choice they have utilized in conjunction with the service they "provide over the Internet"[2], they are then reasoning that IP = Internet. Given this falsehood, it is easy to see how AT&T reached their conclusions: If IP = Internet, and Internet = exemption from paying access charges, then IP = exemption from paying access charges. Therefore, AT&T's services that utilize IP must be exempt from paying access charges. As explained below, however, AT&T's premise is flawed and incorrect.

While IP was originally used as the protocol for the Internet, it is no longer confined to the Internet. IP Telephony can be used in a variety of different applications, including data transfer, video, LAN or WAN configurations, and virtually any computer-related function on a network enterprise that connects computer devices. Given this, AT&T's basic premise is misleading, incorrect, and disingenuous as follows: 1) IP is simply a change in technology. In AT&T's petition, since the jurisdiction of the call does not change, access charges should still apply as they would have previously; 2) for any traffic over IP that cannot be accurately measured, as noted in AT&T's petition[3], there should be, at a minimum, a surrogate charge applied to acknowledge the interstate minutes that have "leaked" onto the public switched network. Such a charge would be similar to the "leaky PBX" (discussed later), and should be applied to ISP dial-up lines that are capable of "leaking" interstate traffic back onto the public switched network; and 3) how a carrier chooses to transport a call has never changed its regulatory treatment. If this were the case, then if a carrier chose to transport an intrastate toll call to its tandem switch in another state and then back into the originating state, per AT&T's logic, this call would become an interstate call. In other words, the regulatory nature of a call does not change depending on how it is handled by a carrier.

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[1] AT&T Petition for Declaratory Ruling, WC Docket No. 02-361, pgs. 5,8
[2] Ibid, pg. 5

IP in essence has become the protocol of choice for a variety of networks as the more efficient tool for handling and transporting all types of information, including voice. In this respect, IP is not the Internet, but rather is the replacement vehicle of choice for transport. Given the fact that AT&T is utilizing IP Telephony for VoIP purposes does not exclude them from paying proper and fair access charges because of the technology they are employing. The fact is the facilities that are connected to the Internet are also connected to the public switched telecommunications network (such as transport [including "Internet backbone" facilities], common line facilities, loop and switching facilities, etc.). Given this realism, AT&T's argument to market their IP Telephony services "over the common Internet" is weakened by the fact that they actually utilize facilities also carrying voice services that are appropriately assessed and compensated through payment of access charges. In this regard, AT&T's position of utilizing IP Telephony to originate and terminate the same types of calls as voice services should not be given discriminatory favorable treatment.

As shown above, IP is another progression in a long series of technology changes that have and will continue to increase the efficiencies of the communications network. Clearly IP does not equal the Internet, and any prior favorable regulatory treatment that has been granted to Internet-related matters should not be blindly granted to services that use Internet Protocol.

Regulatory Arbitrage & Leaky PBX

Voice over the Internet (VOI) is slightly different from VoIP in that the jurisdiction of the traffic is not known. This is generally characterized as computer-to-computer traffic. In any case and in those situations where the jurisdiction cannot be determined, their needs to be a prudent and rational calculation of interstate traffic and an appropriate interstate charge applied. In previous Commission correspondence on this issue there is precedence and documentation related to the characterizations of "leaky PBX" and

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[3] Ibid, pg. 31

"Regulatory Arbitrage". AT&T's petition poses a striking resemblance to these concepts. Regulatory Arbitrage refers to profit-seeking behavior that can arise when a regulated firm is required to set different prices for products or services with a similar cost structure.[4] An example of this, as the Commission notes, is "the fact that an IXC must pay access charges to the LEC that originates a long-distance call, while an ISP that provides IP Telephony does not, gives the provider of IP Telephony an artificial cost advantage over providers of traditional long-distance service. A long-recognized form of Regulatory Arbitrage is the ability of certain owners of private branch exchanges (PBX's) to avoid paying access charges on long-distance calls (the "leaky PBX" problem).[5] In addition to FCC 01-132, the Commission addresses this issue again, instead calling it "Access Charge Arbitrage", in "OPP Working Paper Series 33 – Bill & Keep at the Central Office as the Efficient Interconnection Regime". In that document, the Commission notes, "This arbitrage opportunity arises because, for long-distance calls, the calling party pays local access on a per-minute basis, while, for local calls, the calling party typically pays for the same access on a flat-rated basis."[6] In response by the Commission to the fair and appropriate action that needed to be, and ultimately was, taken to address this problem of arbitrage, a charge was assessed upon carriers for each leased trunk that could "leak" traffic into the public switched network. As the Commission notes, "This charge was designed to compensate the LEC, at least partially, for the loss of regular access charges that would have applied if the call were handled as a regular long-distance call".[7] In a manner analogous to the leaky PBX issue, any ISP that is capable of terminating interstate computer-to-computer or basic interstate computer-to-phone traffic onto the public switched network should be assessed a similar charge. This

[4] COMMISSION 01-132, pg. 7, footnote 18
[5] Ibid, pg. 7, para. 12. The "leaky PBX" problem arises where large users that employ multiple PBXs in multiple locations lease private lines to connect their various PBXs. Although these lines were intended to permit employees of the large users to communicate between locations without incurring access charges, some large users permitted long-distance calls to leak from the PBX into the local public network where they were terminated without incurring access charges. In order to address this problem, the Commission in 1983 imposed a $25 per month charge on each trunk that could "leak" traffic into the public switched network. *See* 47 CFR Sec. 69.115. *See generally* In the matter of MTS and WATS Market Structure, *Memorandum Opinion and Order*, 97 COMMISSION 2d 682 (1983); *Memorandum Opinion and Order*, 97 COMMISSION 2d 834 (1984).
[6] OPP Working Paper Series, 33, Bill and Keep at the Central Office as the Efficient Interconnection Regime, pg. 23, paras. 76-78.
[7] Ibid, pg. 23, footnote 61

assessment would accomplish 3 things in response to AT&T's petition: 1) it would address AT&T's concern that computer-to-computer services would distort competition since they would be exempt from access charges.[8]; 2) it would address AT&T's concern that some, for example, computer-to-phone traffic cannot be measured accurately[9]; and 3) it would address AT&T's concern about the difficulties of determining the exact traffic.[10]

In a clear reading of prior Commission orders including the information presented above, it is evident the Commission intended to prevent and preclude carriers from "gaming the system" and purposely committing Regulatory Arbitrage. As such, and as this concept relates to AT&T's petition, the Commission should either deny AT&T's petition as presented or disallow AT&T's petition while determining a fair and equitable solution involving carriers to pay access charges for IP Telephony services.

Lastly, the common theme of "arbitrage" resurfaces numerous times in previous Commission correspondence on the issue of "leaky PBX" and purposeful avoidance of access charges. Since the universal and current practice of compensating LECs through access charges is not only required but is also essential to the provision and advancement of the public switched telecommunications network, allowing AT&T or any other long-distance carrier to capitalize on Regulatory Arbitrage is in itself discriminatory and in opposition to public interest.

Subsidy and Preferential Treatment Considerations

Should the Commission decide in favor of the public policy issues surrounding this proceeding that VoIP services can and should be provided without having the IP provider pay access charges, the Commission should also realize that this will likely create lost revenue burdens and hardships to small, rural, and insular telecommunications companies. In addition, the granting of preferential regulatory treatment that will be

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[8] AT&T Petition, pg. 29
[9] Ibid, pg. 30

caused by non-payment of access charges could in reality create the need for a "new" subsidy. Allowing IP providers to avoid paying access charges will cause a downward spiral in the collection of access revenues by LECs nationwide, in essence threatening the viable nature of companies to continue offering ongoing, advanced, and universal service to customers in rural and insular areas. Because a "new" subsidy would need to be created, Section 254(e) would preside in that it would be mandatory to make this new subsidy explicit. While the Commission could certainly require this to happen even as it would create additional regulatory administration and oversight, Beacon recommends prevention of allowing this to happen at all would be the best public policy.

In AT&T's petition, they note on several separate occasions that access charges are above-cost and inefficient.[11] In making this argument, AT&T is relying on the Commission's *1998 Universal Service Report.* Since the time of that report, the Commission has ordered, and ILECs have instituted, changes that have significantly reduced access charges arguably at or near levels to what the Commission thinks is actual cost in accordance with the CALLS order. AT&T also states in its filing that, "AT&T thus would pay cost-based reciprocal compensation rates to terminate calls to Verizon customers over Verizon's local switches and loops, rather than paying above-cost access charges."[12] Per AT&T's logic, since interstate access rates and reciprocal compensation rates compensate the ILEC for the exact same facilities, namely switching and local loop facilities, AT&T should be able to "pick and choose" the rate they want to pay. AT&T also admits that they are willfully terminating "non-local" calls over reciprocal compensation facilities, and are now asking the Commission to bless this violation of utilizing existing tariffs/interconnection agreements. As you can see, this is clearly not in the interest of public policy and would give AT&T preferential regulatory treatment.

AT&T Proposed Infrastructure Requirements are not Mandatory

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[10] Ibid, pg. 31
[11] Ibid, pgs. 2,6,8,20,24,25,27
[12] Ibid, pg. 20

In AT&T's petition, they make note on more than one occasion that, "provision of these services *required* it to make large investments"[13] and "AT&T has upgraded its Internet backbone"[14], yet contradict themselves by stating, "AT&T requires affirmative economic savings before it can justify making investments that would allow it to begin even to transition ordinary voice traffic to IP."[15] In this regard, it appears AT&T would like the Commission to believe it has invested in significant infrastructure to enhance and promote the use of IP Telephony to originate and terminate calls via the Internet. It also follows suit that AT&T is using this argument as a precursor in endeavoring to persuade the Commission that they will continue to deploy the necessary investment should the Commission order in favor of their petition. The issue at hand, however, is that AT&T was not forced or mandated to invest in this technology prior to the Commission issuing an order (pending the future adoption of regulation and legislation) on this subject. Let's consider this analogy: If AT&T bought an expensive speedy sports car, would they be entitled or allowed to go 120 mph in a school zone because of the type of car they purchased? The same logic is applicable to the fact that AT&T, on their own accord, chose to prematurely invest in IP Telephony technology without the Commission issuing an order on this pending matter.

Conclusion

Given the evidence and substantiation set forth above, Beacon recommends the following: 1) Access charges should be assessed regardless of any intermediate conversion to any protocol. To the extent calls can be identified as interstate or intrastate, they should be. Anything short of this would in essence be granting a subsidy via a substituted transport service to the disadvantage of all other similar services; 2) For traffic that cannot be identified as interstate or intrastate (i.e. computer-to-computer or possibly computer-to-phone), there needs to be a surcharge similar to that assessed to a "leaky PBX". This assessment would respond to AT&T's concern that computer-to-

[13] Ibid, pgs. 1,24
[14] Ibid, pg. 18
[15] Ibid, pg. 17 & 18

computer services would distort competition since they would not be exempt from access charges. In addition, this would also alleviate AT&T's concern that traffic may not be measured accurately or precisely. Lastly, in quoting prior Commission orders on the notion of Regulatory Arbitrage as well as the other support and precedence contained above, the Commission should deny AT&T's petition since allowing carriers to avoid paying access charges by virtue of using IP Telephony technology while others are appropriately paying access charges for long-distance calling is not only discriminatory but certainly can be constituted as "gaming the system."

Respectfully submitted,

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[Filed Electronically]

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December 18, 2002